# APPENDIX D

## AMERICAN ARBITRATION ASSOCIATION

## COMMERCIAL ARBITRATION TRIBUNAL
## AWARD OF ARBITRATORS

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**In the Matter of Arbitration between**

Re: 74 199 01113 92
Diasonics, Inc.
and
Toshiba America Medical Systems, Inc.

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WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated August 23, 1989 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

Pursuant to the determination of a majority of the Panel as set forth in the Initial Interim Decision, dated April 2, 1993 ("INITIAL INTERIM DECISION") and in the Second Interim Decision, dated December 6, 1993 ("SECOND INTERIM DECISION"), which are incorporated by reference, the following AWARD is hereby entered:

1. TOSHIBA AMERICA MEDICAL SYSTEMS, INC. ("TOSHIBA") shall fully indemnify and reimburse DIASONICS, INC. and its affiliates, subsidiaries, officers, directors, and employees (collectively, "DIASONICS") for all costs and expenses (including all attorneys fees) incurred by DIASONICS as of the date of this AWARD in each of the following actions.

(a) MEDICAL DIAGNOSTIC IMAGING CENTER ET AL V. DIASONICS, ET AL., NO. BC054409, now pending in the Superior Court of the State of California for the County of Los Angeles;

(b) MOBILE MR VENTURE, LTD. V. TOSHIBA AMERICA MEDICAL SYSTEMS ET AL., NO. 373320, now pending before the American Arbitration Association;

(c) MEDICAL IMAGING CENTER OF SOUTHERN CALIFORNIA, LTD. V. TOSHIBA AMERICAN MEDICAL SYSTEMS, INC. ET AL., NO. BC047496, now pending in the Superior Court for the State of California for the County of Los Angeles;

(d) FEDERAL DEPOSIT INSURANCE CORPORATION V. LENOX HILL RADIOLOGY ASSOCIATES ET AL., NO. 92 CIV 3374, Now pending in the United States District Court for the Southern District of New York;

(e) LENOX HILL LEASING ASSOCIATES ET AL. V. TOSHIBA AMERICA MEDICAL SYSTEMS, INCORPORATED ET AL., now pending in the Supreme Court of the State of New York for the County of New York; and

(f) TME ORANGE, INC. V. TOSHIBA AMERICA MEDICAL SYSTEMS, INC. ET AL., NO. L-16799-92, asserted as a cross-claim in the Superior Court of New Jersey County of Essex.

Each of the actions set forth in (a) - (f) above is hereinafter referred to as the "PENDING ACTIONS".

2. TOSHIBA's obligation to fully indemnify DIASONICS in the PENDING ACTIONS as discussed in Paragraph 1 of this AWARD is not subject to the "ordinary course of business" language contained in Section 1.3(c) of the parties' Asset Purchase Agreement, dated August 23, 1989 ("ASSET PURCHASE AGREEMENT") and Paragraph 1 of the Assumption Agreement, dated November 21, 1989 ("ASSUMPTION AGREEMENT"). The language "in the ordinary course" qualifies only those assumed liabilities arising between August 23 and November 21, 1989 and, as so limited, need not be construed in order to resolve the PENDING ACTIONS.

3. The obligation of TOSHIBA to fully indemnify and reimburse DIASONICS in the PENDING ACTIONS as discussed in Paragraph 1 of this AWARD and/or in any Future Action(s) (as defined in Paragraph 8 of this AWARD) is not subject to the 1% threshold set forth in Section 9.2(c) of the ASSET PURCHASE AGREEMENT, as Section 9.2(c) does not govern TOSHIBA's assumption of liabilities as discussed in this AWARD or apply to Section 9.2(b)(3) of the ASSET PURCHASE AGREEMENT, the provision under which DIASONICS is entitled to indemnify.

4. Excluding only those liabilities specifically enumerated and excluded in Section 1.3(c) of the ASSET PURCHASE AGREEMENT and Schedule 1.3 thereto, TOSHIBA assumed all debts, liabilities, contracts, obligations and agreements of, and claims against DIASONICS relating to Diasonics' Magnetic Resonance Imaging ("MRI") Division. After considering all of the evidence submitted by the parties, a majority of the Panel concluded that there should be no departure from the plain meaning of TOSHIBA's broad assumption of liabilities as set forth in Section 1.3(c) of the ASSET PURCHASE AGREEMENT and Paragraph 1 of the ASSUMPTION AGREEMENT. Accordingly, TOSHIBA's assumption of such liabilities extends to, but is not limited to, liability resulting from all claims or causes of action, both legal and equitable, against DIASONICS (including, but not limited to, claims arising under principles of contract and/or tort law), including any liability of DIASONICS for breach of contract and/or the commission of any tort or fraud, whether intentional or negligent, resulting from, arising from, or relating to DIASONICS' MRI Division. Liability for such acts, having not been specifically excluded or excepted from the ASSET PURCHASE AGREEMENT's and ASSUMPTION AGREEMENT's broad liability provisions, was assumed by TOSHIBA. No public policy precludes indemnification for such wrongful conduct occurring prior to the date on which the assumption is made or indemnification is given. *See* Cal.Civ. Code Sec. 2774.

5. TOSHIBA's argument that the language of the ASSET PURCHASE AGREEMENT and ASSUMPTION AGREEMENT should be construed against DIASONICS is rejected by a majority of the Panel. The principle of contract interpretation upon which TOSHIBA relies is applicable only when the parties do not have actual bargaining power and the words of the contract are ambiguous. *Neal v. State Farm Ins. Co.*, 188 Cal. App. 2d 690, 695; 1 Witkin, Summary of California Law (9th Ed.), Contracts, Section 698, and cases cited. However, the principle is inapplicable when, as here, the parties have equivalent bargaining power and there is no ambiguity.

6. TOSHIBA assumed liability for Diasonics Guaranty and Diasonics Shortfall Agreement upon which the Federal Deposit Insurance Corporation's claims against DIASONICS and TOSHIBA are based in *Federal Deposit Insurance Corporation v. Lenox Hill Radiology Associates Et AL.*, No. 92 Civ. 3374, referenced in Paragraph 1(d) above. The failure of Citytrust to consent to DIASONICS' assignment to TOSHIBA of the Diasonics Guaranty and Diasonics Shortfall Agreement does not affect this result. DIASONICS' liability under the Diasonics Guaranty and Diasonics Shortfall Agreement is a liability falling within the broad assumption provisions of Section 1.3(c) of the ASSET PURCHASE AGREEMENT, and, as such, is a liability assumed by TOSHIBA. Moreover, neither the Diasonics Guaranty nor the Diasonics Shortfall Agreement contains any prohibition against assignment without the consent of Citytrust or its successors and assigns. For reasons discussed in the Initial Interim Decision, TOSHIBA's argument that DIASONICS' failure to obtain Citytrust's consent to its assignment of the Diasonics Guaranty and Diasonics Shortfall Agreement constituted a breach or default of such Guaranty and Shortfall Agreement thereby ineffectuating or invalidating TOSHIBA's assumption of liability under either agreement is rejected by a majority of the Panel.

7. TOSHIBA shall fully indemnify DIASONCIS for all liability and/or damages (including, but not limited to, all future attorneys fees, costs, and expenses) incurred by

DIASONICS subsequent to the date of this AWARD in each of the PENDING ACTIONS. For the reasons discussed in the INITIAL INTERIM DECISION and Paragraph 2 and 3 of this AWARD, TOSHIBA's obligation to fully indemnify DIASONICS in the PENDING ACTIONS is subject to neither the "ordinary course of business" language contained in Section 1.3(c) of the ASSET PURCHASE AGREEMENT and Paragraph 1 of the ASSUMPTION AGREEMENT nor the 1% threshold set forth in Section 9.2(c) of the ASSET PURCHASE AGREEMENT. TOSHIBA's obligation to indemnify DIASONICS in the PENDING ACTIONS and/or the Future Action(s) (as defined in Paragraph 8 of this AWARD) includes, but is not limited to, the obligation to indemnify DIASONICS for liability for fraud and/or intentional or negligent misrepresentation.

8. In the event that any person or entity files, or has filed, any action other than the PENDING ACTIONS seeking to hold DIASONICS liable for damages, monetary or otherwise, resulting from, arising from, or relating to DIASONICS' MRI division (the "Future Action(s)"), TOSHIBA shall indemnify DIASONICS for all liability and/or damages (including all attorneys fees, costs, and expenses) incurred by DIASONICS in the Future Action(s) except to the extent that such liability was specifically not assumed by TOSHIBA under Section 1.3(c) of the ASSET PURCHASE AGREEMENT and Schedule 1.3 thereto. As discussed in Paragraph 7 of this AWARD, TOSHIBA's obligation to indemnify DIASONICS for the Future Action(s) includes, but is not limited to, all liability and/or damages incurred by DIASONICS in connections with, or arising out of, any claim or allegation that DIASONICS and/or any of its employees made any intentional or negligent misrepresentation or otherwise committed any fraud.

9. TOSHIBA acquired a division of DIASONICS and any award of punitive damages would relate to that division. Under these circumstances, California public policy does not prevent enforcement of TOSHIBA's obligation to indemnify DIASONICS with respect to such damages. Accodingly, in

the event that an award of punitive or exemplary damages is entered against DIASONICS in the PENDING ACTIONS or the Future Action(s), TOSHIBA shall indemnify DIASONICS for any such damages.

10. The ASSET PURCHASE AGREEMENT provided that the terms thereof were governed by the laws of the State of California. No basis has been shown for the application of the law of any other state.

11. TOSHIBA has withdrawn it counterclaim.

12. The Administrative Fees of the American Arbitration Association totaling SIX THOUSAND SIX HUNDRED AND NO DOLLARS ($6,600) shall be borne by the parties equally.

13. The compensation and expenses of the Neutral Arbitrator totaling FIFTY THREE THOUSAND FIVE HUNDRED FIFTY FIVE DOLLARS AND EIGHTY EITHT CENTS ($53,555.88) shall be borne by the parties equally.

This AWARD, in conjunction with INITIAL INTERIM DECISION and the SECOND INTERIM DECISION, is in full settlement of all claims submitted to this arbitration.

DATED: March 3, 1994 /s/ Peter Anderson

Peter Anderson, Esq.

DATED: March 3, 1994 /s/ William O. Dillingham

William O. Dillingham, Esq.

DATED:

Robert A. Miller, Esq.